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No. 99-527

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

*Petitioners,*

vs.

DAVID POWELL, *et al.*,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## I. THE PROPER SCOPE AND ENFORCEMENT OF TITLE VI REGULATIONS ARE CRITICAL ISSUES MERITING THIS COURT'S ATTENTION.

### *A. This case squarely raises the issues of whether Title VI disparate-impact regulations are valid and whether they are enforceable by private actions.*

The opposition to the petition is perhaps most notable for what it does not say. Respondents tacitly concede that the first two issues in the petition – the validity of Title VI disparate-impact regulations and their susceptibility to private actions – are substantial and important questions meriting consideration by this Court.

Rather than challenging that basic – and indisputable – conclusion, Respondents attempt to re-cast their complaint and the decision of the Third Circuit in an effort to suggest that the complaint alleges something other than what it does. That attempt at legerdemain should fail.

The complaint begins with a preliminary statement that "Plaintiffs allege that Defendants have discriminated ***in effect*** . . ." Complaint at ¶ 1 (App. H to Petition in *Ridge* v *Powell* at 201a) (emphasis added). In Count I of their complaint, Respondents allege that

> 73. The Commonwealth Defendants' funding policies and practices wrongfully discriminate . . . ***by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to***

> ***discrimination*** . . . in violation of the Title VI implementing regulations applicable to federal education programs. . .
>
> ***
>
> 75. The Commonwealth Defendants' funding policies and practices have had the foreseeable, racially discriminatory ***effect*** of further isolating the Student Plaintiffs. . .

Complaint (App. H to Petition in *Ridge* v *Powell* at 223a) (emphasis added). The complaint contains no allegation that any of the defendants purposefully discriminated against anyone. That the disparate impacts may have been "foreseeable" does not convert their complaint into one addressing purposeful or intentional discrimination. *See Personnel Administrator of Mass.* v *Feeney*, 442 U.S. 256, 279 (1979) (knowledge of potential result does not constitute purposeful discrimination).

Respondents describe the Third Circuit's decision as recognizing "that factual development of Respondents' allegations could result in a finding of intentional discrimination." Respondents' Brief at 12. That assertion misstates the Third Circuit's dictum. In a footnote, the court described a suggestion Respondents made at oral argument; it did not adopt that assertion as either a holding or a finding. *See Powell* v *Ridge*, Nos. 98-2096, 98-2157 (App. A at 7a, n.1) ("It appears that plaintiffs suggest that with discovery they may be able to make a case of intent under Title VI . . .").

In fact, the Third Circuit clearly understood Respondents to contend both in their complaint and at oral argument that they were claiming only a disparate impact. *Id.* (App. A at 7a, n.1) ("Plaintiffs should not be penalized

for their scrupulousness in declining to include allegations against public officials concerning conduct that they suspect but of which they currently have no direct proof."). The court of appeals recognized that the linchpin of this case is the disparate-impact claim. Thus, the court began its analysis by writing that "[t]he complaint challenged the practices of the Commonwealth of Pennsylvania in funding public education as having a racially discriminatory effect." *Id.* (App. A at 2a).[1]

Both the complaint and the decision of the court of appeals make clear that the claim of disparate-impact is at the heart of the allegations in this matter. Respondents' attempt to suggest otherwise at this late date underscores their own understanding that the disparate-impact issues are important for this Court's prompt review.

### *B. The opposition does not challenge the nationwide importance of the issues raised in the petition.*

The principal basis on which Petitioners Ryan, *et al.*, urged the Court to grant review is the significant importance of the issues presented. The first two questions in the *Ryan* petition raise purely legal questions about the proper scope of administrative regulations under Title VI and whether those regulations may give rise to private enforcement actions.

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[1] The court of appeals repeatedly characterized the complaint as alleging an improper disparate impact. *See, e.g., Powell* v *Ridge*, Nos. 98-2096, 98-2157 (App. A at 15a-16a) ("The defendants in this case are on notice that plaintiffs intend to prove that their funding formula produced disparate effects, and the defendants are in as good a position as anybody to know precisely what that funding formula entails.").

Respondents tacitly concede that these are critically important questions that have not been answered by this Court. They do not – and cannot – dispute that more than 40 federal agencies have promulgated disparate-impact regulations with their genesis in Title VI and that those regulations affect almost every aspect of our society, from agriculture to the environment to education.

The importance of those core questions is sufficient enough reason for the Court to accept this case for review. Respondents counter that there is no split among the courts of appeals and, indeed, that is so. It is also immaterial.

The principal reason this Court grants *certiorari* to consider issues about which the courts of appeals are split is to bring uniformity to the interpretation of federal law. *See, e.g., McElroy* v *United States*, 455 U.S. 642, 643 (1982). But what of the situation where, as here, the courts of appeals are uniformly incorrect in their conclusions? A majority of the federal circuits have made known their conclusions that Title VI regulations may validly prohibit disparate impacts and that those regulations may be enforced by private actions. *See New York Urban League, Inc.* v *New York*, 71 F.3d 1031 (CA2 1995); *Powell* v *Ridge*, Nos. 98-2096 and 98-2157, 1999 U.S. App. LEXIS 20092 (CA3 1999); *Ferguson* v *City of Charleston*, 186 F.3d 469 (CA4 1999); *Castenada by Castenada* v *Pickard*, 781 F.2d 456 (CA5 1986); *Buchanan* v *City of Bolivar, Tenn.*, 99 F.3d 1352 (CA6 1996); *City of Chicago* v *Lindley*, 66 F.3d 819 (CA7 1995); *Larry P.* v *Riles*, 793 F.2d 969 (CA9 1984); *Villanueva* v *Carere*, 85 F.3d 481 (CA10 1996); and *Burton* v *City of Belle Glade*, 178 F.3d 1175 (CA11 1999).

There was likewise no circuit split on the issue when the Court granted the petition for a writ of *certiorari* in *Seif* v *Chester Residents Concerned for Quality Living*, 118 S.Ct. 2296 (1998). Still, the Court recognized the vast importance of the issue.

Now, nearly two years later, the developing caselaw in the lower federal courts has only served to underscore that importance. Respondents do not – and cannot – deny the significant number of cases still pending or recently decided in the federal courts in which Title VI regulations have been the focus. *See, e.g.*, *Sandoval* v *Hagan*, No. 98-6598 (CA11); *Bryant* v *New Jersey Department of Transportation*, No. 97-1397 (D.N.J.); *Flores* v *Arizona*, No. 92-596 (D. Ariz.); *South Bronx Coalition for Clean Air* v *Conroy*, No. 98 Civ. 4404 (S.D.N.Y.); *New York City Environmental Justice Alliance* v *Guiliani*, No. 99 Civ. 3330 (S.D.N.Y.); *Cureton* v *National Collegiate Athletic Association*, No. 97-131 (E.D. Pa.); *Maryland State Conference of NAACP Branches* v *Maryland Department of State Police*, No. CCB-98-1098 (D. Md.); *Cherokee Robinson* v *Kansas*, No. 99-1193 (D. Kan.); and cases cited on the previous page.

This Court has never squarely decided whether disparate-impact regulations exceed the scope of Title VI and it has never addressed at all whether those regulations, if valid, may support private actions.[2] It should accept this opportunity to resolve both questions.

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[2] As noted in the *Ryan* petition, to the extent the Court addressed the validity of Title VI regulations in *Guardians Ass'n* v *Civil Service Comm'n*, 463 U.S. 582 (1983), the Court reached no holding. Moreover, the splintered decision in *Guardians* has unfortunately generated more confusion than it has resolved.

## II. RESPONDENTS' SUGGESTION THAT THIS CASE IS NOT RIPE FOR CERTIORARI IGNORES BOTH THE TRUE POSTURE OF THE CASE AND THE COURT'S PRACTICE.

Respondents argue in their opposition brief that this case is not ripe for this Court's consideration because there has not yet been a final judgment below.

This Court has not hesitated to review cases in which the courts of appeals have construed purely legal questions and then remanded the cases to the district courts. *See, e.g., United States* v *General Motors Corporation*, 323 U.S. 373, 377 (1945); and *Land* v *Dollar*, 330 U.S. 731, 734 n.2 (1947). In both *General Motors* and *Land*, the Court explained that review was appropriate because the decision of the court of appeals involved an issue "fundamental to the further conduct of the case." *General Motors*, 323 U.S. at 377; *Land*, 330 U.S. at 734 n.2.

As noted in the first section of this reply brief, no matter how urgently Respondents attempt to re-package their assertions, they cannot avoid one fundamental point: the linchpin of their complaint is their claim that the Pennsylvania school-funding formula results in a disparate impact upon members of minority groups. The issues raised in the petition regarding the disparate-impact regulations are "fundamental to the further conduct of the case." *General Motors*, 323 U.S. at 373. Discovery in this case could be protracted and costly, dealing as it likely will with difficult statistical and sociological analyses. While that process will impose significant expense and burden on all parties, the purely legal issues raised in the petition will not change. They are ripe for review now, and immediate review will serve the purposes of the parties to this case as

well as those of the parties to other Title VI regulation cases pending nationwide.

There is strong – and recent – precedent for the Court to take the case in its present procedural posture. For example, consider *Chester Residents*, the case in which the Court agreed to consider one of the same issues presented in this case. In that case, the district court granted a motion to dismiss the complaint. The Third Circuit reversed and remanded for further proceedings. *Chester Residents Concerned for Quality Living* v *Seif*, 132 F.3d 925 (CA3 1997).[3] The defendants filed a petition for a writ of *certiorari* and this Court granted it. This case is now in the same procedural posture as *Chester Residents* was in at the time the Court accepted review of that case.

In *Blessing* v *Freestone*, 520 U.S. 329 (1997), the district court held that the federal statute at issue did not give rise to an right enforceable by a Section 1983 action. A divided panel of the Ninth Circuit reversed, held that the statute did provide a private right of action, and remanded the matter to the district court for further proceedings. At that procedural juncture, the Court granted *certiorari* and reversed the Ninth Circuit's decision.

Indeed, at least three cases on the Court's docket in the current Term are similarly situated.

In *Shalala* v *Illinois Council on Long Term Care*, No. 98-1109, the district court dismissed the complaint on

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[3] The Third Circuit wrote that "we will reverse and remand for further proceedings, including a consideration of the remaining grounds for dismissal contained in defendants' Motion to Dismiss." 132 F.3d at 937.

jurisdictional grounds. The Seventh Circuit vacated the dismissal and remanded the case for further proceedings. *See Illinois Council on Long Term Care* v *Shalala*, 143 F.3d 1072 (CA7 1998). The court of appeals' remand order did not prevent this Court from granting review.

In *Willowbrook, IL* v *Olech*, No. 98-1288, the district court dismissed the complaint for failure to state a claim. The Seventh Circuit reversed and remanded for further proceedings. *See Olech* v *Willowbrook*, 160 F.3d 387 (CA7 1998). Nonetheless, this Court granted a petition for a writ of *certiorari* to review the Seventh Circuit's decision.

In *Pegram* v *Herdrich*, No. 98-1949, the district court granted a motion to dismiss after it determined that the plaintiff had failed to state a claim under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* The court of appeals disagreed, reversed, and remanded the case for discovery. *See Herdrich* v *Pegram*, 154 F.3d 362 (CA7 1998). With the case in that posture, this Court granted a petition for a writ of *certiorari* to consider the purely legal question decided by the court of appeals.

The bottom line is that, confronted with particularly important legal issues, this Court has regularly accepted review of cases in precisely the same procedural posture as this case. There is no impediment to a prompt consideration.[4]

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[4] Respondents argue that the question of whether Title VI regulations can give rise to private actions would not be dispositive of this case because the second count of their complaint pleads a Section 1983 claim. Their assertion is misguided. First, the petition raises as

## III. THE COURT SHOULD REVIEW THE STANDING ISSUE RAISED IN THE PETITION BECAUSE IT PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION.

The petition asserted that this case presents a standing issue of first impression for this Court. Respondents do not question that assertion.

Respondents contend that this case is distinguishable from *Asarco, Inc.* v *Kadish*, 490 U.S. 605 (1989), because that case concerned taxpayer standing while this case concerns an allegation of discrimination. Unfortunately, Respondents do not explain why they believe this distinction to be material, and in fact it is not. As noted in the petition, *Asarco* stands for the rule that, where the remediation of the plaintiff's asserted injury rests on the unfettered choices of third parties not before the court, the injury is not redressable as required for Article-III standing. Here, Respondents complain of an array of ills that all stem from lack of funding for the School District of Philadelphia. They do not dispute that approximately half of the funding for the school district is provided by the City of Philadelphia, which is a plaintiff, or by the federal government, which is not a party. That scenario provides the Court with an opportunity to consider

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its first issue the validity of the regulation itself, an issue that would be case dispositive (the Section 1983 claim in the complaint could not proceed were the regulation invalid). Second, the Court has often taken cases that raise important federal issues even if there are other issues in the case. *See, e.g., City of Boerne* v *Flores*, 521 U.S. 507 (1997) (considering the constitutionality of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb, *et seq.*, although "[t]he complaint contained various claims. . .")

the rule in *Asarco* in a slightly different, but no less important, setting.

Respondents correctly note that the standing inquiry is a subpart of the Article-III case or controversy requirement. One of that requirement's principal goals is to insure that the federal courts do not render decisions that are, in fact, merely advisory opinions without effect in the real world and in the affairs of the parties. Because of the wholly speculative nature of Respondents' claim that an injunction directed only to the executive officers of the Commonwealth of Pennsylvania would redress the injuries claimed in the complaint, there is a substantial reason for this Court to question whether this matter presents a proper case or controversy for resolution by the federal courts.

## CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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